The loose cannon syndrome: University as business & students as consumers

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Abstract

This paper will draw distinctions between legal obligations imposed on universities which are capable of being implemented and policed by each university, and those which are requirements of individuals. It will examine two areas of law, misleading and deceptive conduct and the requirements of natural justice and procedural fairness, both of which impose obligations and potential liability on both universities as institutions and staff as individuals. Until each and every employee understands their roles, their functions and their powers (including the correct exercise of discretion in exercising such powers), then universities will have failed to take all possible steps to not only secure their legal position, but to also allow employees to secure their legal position.

If universities are increasingly seen as businesses, and if students are increasingly seen as the consumers of services provided by universities, then the legal consequences of the business/consumer relationships need to be addressed.

Universities and regulation

Universities have had no difficulty in adapting to a regulatory environment where an onus is placed on the institution to amend its corporate culture. Examples may be drawn from occupational health and safety legislation, from anti-discrimination law and from various environmental protection statutes. If a university willingly establishes compliance systems for these 'laws', is there any objection to establishing education, compliance and quality management systems for other 'laws'?

What is required is an appreciation of the extent to which a university, its administration, academic and general support staff must adapt to a new culture of regulation. If each piece of regulatory legislation is looked at and implemented in isolation, then an opportunity to establish new lines of communication in pursuit of a common endeavour is lost. This is a requirement of common understanding of the role, purposes and intentions not only of the legislation, and whatever internal compliance systems are required, but also of its context within the university and its relevance vis-a-vis each employee's role in the total construct of the university.

If one asks the question, are universities committed to ethical and moral behaviour, the answer would be an unqualified yes. The practical consequence to such commitment may take various forms. Many universities have 'Mission Statements' or a statement of goals and ideals incorporated in documents sometimes referred to as 'Codes of Practice'. The concept is clear but the objectives underlying such documents are not. The difficulty with such statements lies in both their generality and their access. Mission Statements will only be truly effective when there is a personal identification with the common objectives outlined in the statement. If the common purpose of such statements is to promote ethical conduct, then merely stating so as a goal or objective is totally inadequate. Questions need to be asked as to, inter alia, whether such documents are enforceable or idealistic, where are they generated and for what purposes, and their nexus with conduct of employees.[1]

Numerous arguments have been presented in support of 'Mission Statements' and 'Codes of Practice',[2] but criticism has been directed to the lack of progress in their application.[3] It is a difficult process to apply principle, and until a broad investigation of existing practices is undertaken, and modifications made in accordance with the principles outlined in the document(s), then those documents will sit in a drawer, gathering dust until the next time someone finds it expedient to hold them aloft in grand gesture.

One major difficulty in approaching these issues is that insufficient research has been undertaken as to the legal consequences of what we do, and what responsibilities we bear, within the university structure. One may justifiably speculate that few academic or general members of university staff have an accurate conception of their legal responsibilities and powers vis-a-vis the university and the student.

One of the reasons for this lies in the regulatory culture of Australian universities. Universities have an 'us and them', not a 'we' mentality. The academic staff do the work at the coal-face and the administrative staff take care of management and regulatory requirements. That simplistic division of 'responsibility' is unsatisfactory on a number of levels. Such an approach will certainly not satisfy legal requirements. To a large extent it never has, but the culture of Australian universities (based on each employee's individual perceptions of their specific role and their university's more general functions) has allowed, inter alia, academic staff to act in blissful ignorance of the legal responsibility which they undoubtedly carry.

Every employee of the university is a delegate of the university for some purposes, whether advising, enrolling, teaching or supervising students, or buying chalk. In doing these things, employees are acting for, and therefore binding, their university (subject to some legal qualifications). Legally, then, every employee is a potential 'loose cannon on the deck'. Until each and every employee understands their roles, their functions and their powers (including the correct exercise of their discretion in exercising such powers), then the university has failed to take all possible steps to not only secure its legal position, but to also allow the employee to secure their legal position.

The student as a consumer

There are two areas of particular concern in the context of university/student relations which should be addressed. The first is the effect of the Fair Trading Acts in each state and the Trade Practices Act equivalent in the Commonwealth, and issues of potential liability arising from them. The second concerns the requirements of natural justice and procedural fairness.

Both of these areas of substantive law raise issues of personal, institutional and administrative responsibility. Procedures need to be adopted which address the application of the law to the existing structures within the university. That this is not being done is well illustrated by the example of a university which was sued on the basis of incorrect academic advice to a student. Instead of using this opportunity to promote awareness of the issues, and the potential liability thus raised, as should have been done, the terms of settlement in that case allegedly contained a standard non-disclosure clause. Not only are the facts of that case not known to the university community generally, although loud whispers have reached many other campuses, but staff who should be aware (and on some

authority, have a right to be made aware) of the potential for liability, have deliberately been excluded from the available information and consequently from the important lessons to be learned from that particular case.

It is one thing to know the law. It is another thing entirely to understand what it means to convert a series of abstract concepts in legislation to a specific workplace. Is it sufficient to know the law or is it necessary to implement systems of compliance to implement the law? One is sometimes led to the conclusion that only some laws are considered worthy of administrative action. Universities have, on occasion, acted promptly not only to implement but to institutionalise some law, such as affirmative action programs or anti-discrimination law, yet have failed to provide instruction, training or education programs in other areas.

The major distinguishing feature between those laws which are acted upon by universities and those which are not would appear to be that universities only act, in general, if they are required to do so. There appears to be little or no acknowledgment of law which is relevant to, and binding upon, individuals working within the university environment. That this is so is inconsistent, for persons acting within their authority will bind the University, and will impose vicarious liability on the university.

To adequately deal with the potential for liability arising from the conduct of each and every member of the university staff it is essential that employees be equipped with sufficient knowledge to prevent the conduct complained of from occurring.

(a) Misleading or deceptive conduct[4]

The legislative scheme for misleading and deceptive conduct is found in the Trades Practices Act 1974 ('TPA') and principally comprises two sections: s.52, which in two lines specifies a broad prohibition of conduct which is misleading or deceptive or is likely to mislead or deceive, and s.53, which prohibits a range of conduct including, inter alia, representations as to standard, quality, value, grade, approval, use or benefits, price or need.

The distinction between s.52 and s.53 lies in the remedies available for breach. Breach of s.52 results in civil liability ie. damages, appropriate rectification or relief,[5] or injunctive relief,[6] whereas a breach of s.53 exposes an accused to criminal liability with pecuniary penalties of up to $200,000 for a body corporate and $40,000 for an individual,[7] in addition to the remedies listed above in respect of a breach of s.52.

Most people have a vague understanding of the concept of misleading and deceptive conduct. However, the provisions impose significant obligations in addition to the statements of general principle. The nature of that potential liability is indicated by referring to s.51A, which deems representations as to future conduct, including the doing or not doing of any thing, misleading. The effect is to impose on the person who is alleged to have said or done or performed the conduct complained of, the burden of proving that there were reasonable grounds for having said or done or performed that conduct. This, onerous enough in itself, is reinforced by deeming that the corporation did not have reasonable grounds, and requiring them to adduce evidence to the contrary.

Intriguingly, in a number of cases, courts have held that the making of a contract implies a representation of future conduct (ie a promise to carry out the terms of the contract) and that a failure to do so may invoke s.51A and its deeming provisions.[8] In the context of Universities, one can only speculate on the terms and conditions of the contract between the University and each student,[9] but if such a contract includes implied terms along the lines of, inter alia, a reasonable standard of care, skill and diligence in teaching, then the potential for the operation of s.51A is far broader than I have already indicated.

This would have implications for the university to the extent that it would, for example, be required to provide staff, classrooms, library facilities, language support, teaching and assessment which were adequate in accordance with generally accepted university standards in Australia and/or which a student might reasonably expect of an Australian tertiary institution, unless, in its promotional literature it expressly disclaimed that such services were of a reasonable standard. It may also be implied that appropriate University staff undertake to assess students' work with reasonable care and attention, not to lose students' work and to act with reasonable fairness.

What 'reasonable' means in these circumstances would probably depend on evidence from educators in the Australian university community of what constitutes good practice, though it would be open to a court to find that generally accepted standards were not sufficiently high. This would be a matter of evidence to be established in each case. In the case of undergraduate teaching this would not be difficult to establish, but postgraduate students proceeding by research would have greater difficulty.

The nature of the contractual relationship between a student and a university is an area where insufficient research has been undertaken,[10] although the questions of whether reasonably implied terms in such contracts are susceptible to the operation of TPA s.51A is academic, as the student may presumably be able to sue for the breach of those terms. There is, however, one significant difference between actions taken in contract and actions under misleading and deceptive conduct provisions. If suing under the latter, no exclusion or exemption clause will have effect,[11] whereas if suing in contract, it may.[12] This is a significant distinction, given the quantity of promotional material leaving Departments, Faculties and university administrations on a daily basis, most of which should include, for example, qualifying clauses requiring confirmation from, say, a named person, or some other mechanism.

To incur liability under the TPA, it is necessary to be a corporation, acting in trade or commerce, engaging in misleading or deceptive conduct. After the Trade Practices Act was introduced, there was considerable uncertainty as to whether, under the legislation, universities carried on 'trade and commerce'. The introduction of state Fair Trading Acts, which mirror the TPA in these provisions, has, however, rendered that objection irrelevant.[13] Indeed, the Fair Trading Act 1987 (NSW) defines 'trade' as including services traditionally regarded as professional.[14] In any case, given the increasing attention being given to full fee paying international students, can a serious argument be mounted that Universities do not engage in trade or commerce?

As to the second requirement, universities are typically corporations.[15] The only other impediment to the universal application of the TPA was removed when the states replaced the word 'corporation' with the word 'person' in their equivalents to ss.52 and 53.[16] As a result, not just corporations, but partnerships and individuals are subject to the principles of misleading and deceptive conduct.

There are numerous judicial statements as to the meaning, application and purpose of the expression 'misleading and deceptive'. The uncertainty of their meaning is a reflection of their generality.[17] It was intended that s.52 and s.53 have an effect, and modify the conduct of, every participant in commercial relationships. It establishes a norm of conduct, and although intention is not a necessary ingredient, the concept of audience is relevant in determining whether they (or she or he) were (or was) misled.[18]

The liability under these misleading and deceptive conduct provisions has no nexus with contract. An application may arise from a contractual relationship, but it need not. Indeed, most cases brought under these provisions may be described as complaints against advertising, mostly by trade rivals.

In the context of university experience, two scenarios may be postulated. The first is that of a student being advised on a matter of either administrative or academic policy or fact, and the second is that of statements or information provided to the public. The issue of dissemination of information to the public, whether in the form of advertisements or, say, Faculty Handbooks, information leaflets or even the university Calendar, requires a consideration of consequences. In one famous American decision, frequently referred to in Australian decisions, it was said:

Advertisements are intended not to be carefully dissected...but rather to produce an impression upon prospective purchasers.[19]

The following general points should be noted:

(a) engaging in conduct includes the doing or refusing to do any act, and includes omissions;[20]

(b) in relation to s.52, intention to mislead or deceive, or whether the information, advice or conduct was honestly given, or inadvertence, is irrelevant[21] - the issue is the effect, not the act itself;[22]

(c) in relation to s.53, being a criminal provision, it is necessary to prove the offence beyond reasonable doubt - there is, however, no need to prove mens rea or intention, so that even if the person making the statement believes it to be true, an offence may still be proved under s.53; [23]

(d) silence may, in itself, constitute mislcading or deceptive conduct[24] - this creates a de facto obligation, when providing advice, to provide all relevant information which would reasonably be required given the circumstances of the conduct complained of;

(e) all that need be proved is that conduct was likely to mislead or deceive, not that conduct did actually mislead or deceive; and

(f) disclaimer clauses, exclusion clauses and qualifying clauses will have no effect, per se, on the question of whether the conduct complained of was misleading or deceptive.[25]

Given these statements of the law, and some of the principles on which those rules are interpreted, it is clear that universities need to act to ensure compliance. Regardless of whether the institution is found liable under the Trade Practices Act, or whether an individual employee incurs liability under the relevant state Fair Trading Act, or whether both incur liability, the credibility and reputation of the institution itself will suffer.

Universities provide an enormous range of conduct where the possibility of engaging in misleading and deceptive conduct exists. One of the most significant areas of concern must be the area of the recruitment and support of overseas students. Much anecdotal evidence, some Australian, indicates the danger inherent in what may be styled hard sell recruiting. As one participant has indicated:

In my experience, second-hand car salesman are models of good practice when contrasted with the representatives of some UK universities and polytechnics.[26]

How often have universities promised facilities and services to overseas students and then failed, despite good intentions, to provide them? How many colourful adjectives, some or all of which may be misleading or deceptive, have been utilised in the service of university salesmanship? The issue of after sales service is especially significant.[27] It is not uncommon for academic staff to be advised by a student that they had been led to believe that a particular situation existed, when in fact, upon arrival at the particular university, it did not.

The issue of academic support for overseas students, and in particular, language support, is an area of potential liability. Even the admission of students who are unqualified, either academically or linguistically, to undertake a specific course with any reasonable hope of success, raises serious issues. What of a not unrealistic scenario where a person advises a student that there should be little disadvantage because of, say, a lack of proficiency in the English language. This is a classic s.51A TPA situation which would require the person making the statement to adduce evidence of the grounds upon which such a statement was made.

The Trade Practices Act and the various state Fair Trading Acts impose a legal requirement that students be advised not just accurately, but carefully and fully. Is it fair to imply into the admission of an overseas student pre-sessional and/or in session language support even if none is promised? Is there an implied promise, or even an expectation on the part of the student, that such services will be available, given the lack of fluency in the English language? Is it misleading or deceptive or likely to mislead or deceive a student not to advise a student that such services exist?

These questions are based in legally defined obligations, but there is also a moral dimension. The law exists as a statement of general principle, and there is a moral obligation to implement that law. The truth is, though, that in all these cases, and without imputing mala fides or negligence, few employees would be aware of even the potential liability of what to them may be their 'best efforts'. If people are unaware of the law, as a statement of principle and as a manifestation of a moral or ethical imperative, then who is to blame? Who is gaining the benefit? The answer is obvious. The universities are marketing and promoting a product. It is their responsibility to not only advise potential students, and the general public if appropriate, but more importantly, to implement and maintain a system of compliance with those principles.

What consequences flow from a breach of these obligations? Apart from the obvious moral and ethical obligation to ensure adherence to the law, there are statutory penalties to consider. That few actions have been taken under the Trade Practices and Fair Trading legislation is understandable given students' lack of resources, the power relationship and access to the legal system. With the advent of student fees and the self-evident competition amongst universities for undergraduate and postgraduate students, any expectation of continuing student reticence needs to be modified.

Under the Trade Practices Act it is possible to apply for injunctive[28] or ancillary relief.[29] The courts have a wide discretion to grant appropriate orders. The two major penalty provisions, however, are the award of damages for a breach of either TPA s.52 and s.53[30] (or the Fair Trading Act equivalents[31]) and the pecuniary penalties for, inter alia, a breach of s.53.[32]

A recent case has discussed the issue of determining eligibility for the award of damages in respect of a breach of TPA s.52. In that case, Lockhart J. held that the damages to be recovered are not only those where an applicant relies directly on the representations or conduct involved in the contravention. There is a requirement of a sufficient cause of link between a respondent's conduct and the recoverable loss or damage. That is, the contravention of s.52 must be the real, effective or direct cause of the applicant's loss.[33]

Although those remarks were made in the context of an action between trade rivals, it is arguable that in the context of education, the loss or damage suffered may extend not just to the person or persons who relied on the representation or conduct complained of, but also those who were ultimately affected by it. If, then, a student has difficulty obtaining employment, and even if only part of the reason for that difficulty is the reputation of the institution or faculty where a contravention occurred (such as incorrect advice as to accreditation or standards - even if such advice or claims were made to an individual), then under Justice Lockhart's analysis, that institution or that individual, or both, may be liable.

Of more significance is the issue of pecuniary penalty. As has been stated, a breach of, inter alia, s.53 of the TPA,[34] would expose the institution or the individual to an action under s.79 of the TPA, which provides for penalties of up to $40,000 for a natural person and $200,000 for a body corporate.[35]

The courts have imposed on management the responsibility for control of staff.[36] Perhaps this responsibility may be termed quality management. At its most basic, this obligation must surely include the education of employees in their legal responsibilities, and in the consequences for breach of those duties. It may also include a system of supervision such that a relatively junior employee is not placed in the situation of having to make statements or exercising responsibility beyond what may reasonably be expected.

This raises serious issues in relation to what some universities call 'devolution of power' or 'devolution of control'. The question to be asked is to what extent a University administration may abdicate control and isolate responsibility to those exercising that control, say at a faculty or department level.

In *Ducret v Nissan Motor Co (Australia) Pty Ltd*, Northrop J said:

Lax or inefficient management control between departments of a corporation cannot amount to a defence of a breach ... nor can it mitigate against the seriousness of the offences committed.[37]

Under the Trade Practices Act, regardless of the extent of delegation, an obligation remains to ensure compliance and, in effect, quality control. What is true for BHP Ltd and its myriad of operating divisions and sub-divisions, is also true of a University. It is possible to delegate power, it is more difficult to delegate responsibility.

In *Eva*, it was also said that:

In assessing appropriate punishment for a crime, the court is required to have in mind not only the nature and extent of the offence itself but also a wide variety of associated circumstances. Such circumstances constitute a context within which to view the penalty. Adverse publicity is often one of the inevitable consequences of wrongdoing and in most cases is without influence in the assessment of appropriate penalty. [8]

Is there any stronger deterrent for a university than adverse publicity,[39] particularly in the area of consumer protection law?

(b) Natural Justice and Procedural Fairness

Universities exercise power and make decisions. This statement is legally true and practically false. People make decisions, and those decisions may be good, bad, arbitrary or well reasoned. Because the process of administration and decision making creates a hierarchy of power, control and some level of dependency, the exercise of discretionary power is circumscribed by law. That protection, afforded to those whose interests are the subject of administrative decision-making, is not generally concerned with the substance of the decision. The legal system is, however, concerned with the processes by and through which those decisions are made.

A decision is not merely a rule applied to a set of facts. Variables such as, inter alia, the factors considered and the method(s) employed to balance one consideration against other considerations, the personalities concerned, the resources (including time) with which to produce an informed decision, the politics of an institution and the context in which the decision is made, are all potential determinants in decision making. Yet even this apparent distinction between the law (in the form of the rule to be applied and the authorised power to be utilised) and the practice of decision making is not as obvious as may be imagined.

Administrative law requires that decision makers:

(a) take into account relevant considerations;[40]

(b) not take into account irrelevant considerations;[41]

(c) ensure that the person whose interests are affected is given the opportunity of replying to allegations or queries and presenting their interpretation of the facts or allegations;[42]

(d) not act in bad faith, or with a malicious or fraudulent purpose;[43]

(e) not act with improper purpose;[44]

(f) not act so unreasonably such that no reasonable person could have exercised their power in that way;[45] and

(g) base their decision on 'logically probative evidence' rather than 'mere speculation or suspicion'.[46]

In recent years, courts have moved beyond technical requirements of natural justice:

The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.[47]

These rules are premised on a policy of due process or procedural fairness. They are not divorced from reality. A decision theorist may, for example, presume compliance with these rules as a premise to rational decision making.[48] Whether administrative decision making is analysed by organisational theorists, political scientists, or decision theorists, the reality of legal policy requires adherence to the model of procedural fairness.

The consequence of imposing a methodology or standard of conduct on decision makers is that accountability has been imposed on administrators exercising discretionary power.

An important issue arises, however, as to when, in the context of a university, each of the above 'rules' need be complied with, and what responsibility lies on the university to ensure compliance. Any exercise of power authorised or delegated by a university is, in law, an act of that university. Using the example of my own university, s.17 of the University of Wollongong Act 1989 provides that, ultimately, all decision-making power is vested in the Council of the University. The question is whether the Council, in delegating power to officers of the University, also delegates the responsibility for the exercise of that power.

May the requirement of natural justice and procedural fairness be re-formulated as an obligation to ensure compliance? Although there may be no legal requirement for a University to develop and maintain compliance systems to ensure that the principles of administrative law are utilised, the consequences of not doing so may be grave indeed.

These issues raise legal questions, certainly, but there is a moral dimension. Why are there so few natural justice and procedural fairness actions brought against universities? The answer again lies in issues of empowerment, in a lack of knowledge, skill, expertise and resources to bring legal action. That actions have not been brought is irrelevant to the issue of compliance. The law has specified a code of conduct for administrative decision making, and there is a moral, as well as legal, imperative to comply. Whether that imperative extends beyond the individual to the employer is the more significant question.

Most administrators intuitively invoke the rules of natural justice and procedural fairness whether or not they are conscious of them, but many decisions are made without due consideration being given by people in ignorance of the legal requirements.

Knowledge of the rules of natural justice and procedural fairness also assist in the provision of skills to equip and focus decision making as a process requiring a methodology. Indeed, American research had indicated that procedural fairness increases satisfaction with the decision itself.[49] It would require little effort for universities to incorporate training programs into, say, the induction process, to make employees aware of their responsibilities. Such training would not only benefit the employee, but those about whom decisions are made, and the university as an institution.

Conclusion

Universities, through their internal staff training departments, typically run dozens of courses on teaching, techniques of various kinds, management, communication and other skills. Few, if any, train academic and general staff in their legal obligations. Why not? One of the most basic units of knowledge with which to carry out a designated function is the correct procedure for dealing with the authority which has been delegated, as well as knowledge of the consequences of wrongful conduct.

Universities sometimes claim to demonstrate their commitment to principles and ideals through the adoption of 'Codes of Conduct', 'Mission Statements' and the like. This is not a demonstration of commitment. It is a statement of commitment. Applying those principles by educating staff in the practical implementation of them will lead, hopefully, to the adoption of a common purpose. Many of the legal principles referred to in this paper, whether under the heading of misleading and deceptive conduct or under the heading of natural justice and procedural fairness, are merely reflections, and perhaps applications, of more general moral and ethical precepts.

If staff are appropriately trained in their legal obligations, then the number of 'loose cannons on the deck' will be significantly reduced and the university will have more fully complied with their obligations at law.

Apart from the moral or ethical obligation to ensure that law is adhered to, there are significant practical considerations for doing so. In an era of increasing competition to provide undergraduate and postgraduate education to domestic and international students, product differentiation and marketing requirements assume greater importance. Commitment and adherence to, and development and application of, ethical and moral codes in respect of the business of education is only the first step in a continuous process of self-assessment.

References

1. See generally Coady & Sampford, *Business, Ethics & the Law,* Federation Press, Sydney, 1993

2. Murphy, 'Creating Ethical Corporate Structures', (1989) *30 Sloan Management Review*, No. 2

3. Sinclair, Improving Ethics through Organisational Culture, in *Business, Ethics & the Law, op cit* fn.1, p128

4. The following references may be useful in the area of consumer protection in general, and misleading and deceptive conduct in particular:

Miller, *Annotated Trade Practices Act*, 14th edn, Law Book, 1991

Goldring, Maher & McKeough, *Consumer Protection Law in Australia*, 4th edn, 1993

Taperell, Vermeesch and Harland, *Trade Practices and Consumer Protection*, 3rd edn, 1983

5. *Trade Practices Act 1974* (Cth) ss.82(1) & 87

6. *Trade Practices Act 1974* (Cth) s.80(1)

7. *Trade Practices Act 1974* (Cth) ss.75B & 79

8. *Futuretronics International Pty Ltd v Gadzhis* [1992] 2 VR 217

9. See generally an unpublished paper by Goldring, Stoianoff & Considine, Honesty and Competitiveness in the Delivery of Education, National Conference on Higher Education & the Law, University of Wollongong, 7th May 1992

10. Although see generally Goldring, Stoianoff & Considine, *ibid*

11. *Petera Pty Ltd v EAJ Pty Ltd* (1984) 7 FCR 375

12. *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827

13. See generally, Goldring, Maher & McKeough, *Consumer Protection Law*, Federation Press, Sydney, 1993

14. eg *Fair Trading Act (NSW) 1987*, s.4(1)

15. See eg *University of Wollongong Act (NSW) 1989*, s.5

16. In NSW, for example, TPA s.52 corresponds with FTA s.43

17. *Parkdale Custom Furniture v. Puxu P/L* (1981-82) 149 CLR 191

18. *Brown v Jam Factory Pty Ltd* (1981) 53 FLR 340 per Fox J at 348

19. *Stanley Laboratories v. Federal Trade Commission* (1943) 138 F.2d 388

20. TPA s.4(2)

21. *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82

22. *Parkdale Custom Furniture v. Puxu P/L op cit* fn 10

23. *Given v CV Holland (Holdings) Pty Ltd* (1977) 29 FLR 212

24. *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83

25. *Benlist Pty Ltd v Olivetti Australia Pty Ltd* (1990) ATPR 41-043

26. John Belcher, International Students Officer at Queen Mary College, London; quoted in D. Walker, 'Hard-sell Recruiting by British Universities Assailed' (1985) 30 *Chronicle of Higher Education* 39

27. D. Ingram, 'Establishing Support Services for Overseas Students: The Importance of After-Sales Service', in *Responsible Recruitment - Report of a Conference on Overseas Students* (1986)

28. TPA s.80

29. TPA s.87

30. TPA s.82

31. eg. FTA (NSW) s.68

32. TPA s.79

33. *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) ATPR 41-186

34. s.44 of the Fair Trading Act NSW

35. Penalties were doubled under the Trades Practices Legislation Amendment Act 1992, effective from the 21 January 1993

36. *Eva v Southern Motors Box Hill Pty Ltd* (1977) 30 FLR 213 at 215 per Smithers J

37. (1979) 38 FLR 126 at 133

38. (1977) 30 FLR 213 at 222

39. See particularly powers under TPA s.80 and s.80A

40. *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1985-86) 162 CLR 25

41. *ibid.*

42. *Ridge v Baldwin* [1964] AC 40

43. *R v District Council of Berri* (1982) 31 SASR 342

44. *R v Toohey* (1981) 151 CLR 170

45. *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223

46. *Minister for Immigration & Ethnic Affairs v Pochi* (1980) 31 ALR 666, and see generally *Allars Introduction to Australian Administrative Law*, Butterworths, Sydney, 1990

47. *Kioa v West* (1985) 159 CLR 550 at 584 per Mason J

48. PP Craig, *Administrative Law*, Sweet & Maxwell, London, 1983

49. Tyler, What is Procedural Justice? (1988) 22 *Law & Society Review* 103

Australian higher education, constructivism and the relevance of the transmission view: A reply to Coady and Miller

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In a recent article in the Australian Universities' Review, Coady and Miller (1993) argue that the functions of Australian universities are ill-defined, and that debate concerning theory of tertiary education suffers from a lack of theoretical precision. They promote a modern conception of the university based on a re-examination of John Henry Newman's seminal work. Specifically, Coady and Miller argue that the liberal purposes of a university as the pursuit of new knowledge and the cultivation of students' intellects, and a utilitarian purpose as the fostering of personal skills and competencies contributing to economic growth, are not incompatible (as Newman himself acknowledged).

Coady and Miller's main point is well taken; Newman's consideration that "the true and adequate end of ... a university ... is thought or reason exercised upon knowledge" (cited in Tolley, 1975, p.25) does not disclaim the utility of such an end, especially with regard to economic productivity. It is suggested that the 'exercise of reason', or commonly, critical thinking, is the capacity to make confident logical judgements which are based on a breadth of knowledge but tempered by an awareness of ignorance; relative to a particular field, it is a discriminating breadth of vision (cf. Tolley, 1975), and perhaps is the most potent quality that business, professional and trades people alike can possess.

However, Coady and Miller's suggestion that the transmission of so-called liberal knowledge by academics cultivates students' intellects and intellectual virtues (e.g. logical thinking and balanced judgement) is highly questionable. Liberal knowledge is "knowledge informed by reason" and "particular facts that have been related to one another" (p.41). In Coady and Miller's view, a goal of a university is to transmit liberal knowledge, and students must acquire or absorb this knowledge, just as their teachers before them did "through years of training" (p.41). Students only acquire intellectual virtues "after a great deal of disciplined work under the guidance of appropriately trained teachers" (p.42).

Coady and Miller's explicitly stated transmission view of teaching and learning appears to be based, in turn, on objectivism (e.g., Duffy & Jonassen, 1992; Jonassen, 1991); in this view, knowledge exists externally as a real entity. People can have valid knowledge insofar as they can have a correct representation or copy of entity knowledge, and valid knowledge, in turn, can be 're-presented' externally as a real entity. Objectivism leads to a conceit of knowledge, in that, it is assumed that certain people can aspire to become privileged holders of valid representations of real entity knowledge, or authorities compared to less experienced students, and can capably organise re-represented objective knowledge and map efficiently, or impose, the latter onto learners. In teaching based on objectivism, although students' interpretations sometimes are tolerated, learners rarely are encouraged to express their ideas; rather, as Jonassen (1991) argues, "it is the role of the teacher ... to interpret events for students). Learners are told about the world and are expected to replicate its content and structure in their thinking (p.10). Consistent with this view, Coady and Miller imply that tertiary students must become 'disciplined' in accepting or absorbing 'facts' which have been suitably structured by thoroughly trained academics.

Objectivism contrasts primarily with constructivism. Two fundamental principles of constructivist philosophy are that knowledge exists in people's minds only, and that new knowledge is created from within in interrelation with things in the world (Hendry, submitted). Constructivism is seen to be useful notably in Science and Mathematics education (e.g., Wheatley, 1991) and, more recently, Tertiary education (King, 1993; Koch, 1992). Research on the use of constructivist teaching strategies at different academic levels shows that these strategies are effective in promoting students' procreation of acceptable ideas and procedures. In particular, in Mathematics education, compared to traditional teaching methods, constructivist methods result in students' development of higher levels of thinking as measured by standard and non-standard tests both (Koch, 1992; Cobb et al. 1991). Students enjoy learning in a constructivist classroom (Hand, 1988; Hand, Lovejoy & Balaam, 1991), and perceptions and attitudes toward the subject concerned (Cobb et al. 1991; Hand, 1988; Hand et al.1991; Koch, 1992; Stanbridge, 1990).

Constructivist teaching consists fundamentally of providing opportunities for students to explain and evaluate their ideas in discussion (e.g., Cobb et al. 1991; Yackel, Cobb & Wood, 1992; Driver & Oldham, 1986). Recently advocated cooperative learning strategies (King, 1993), whereby, for example, students participate in small-group discussion to achieve a consensus with respect to a specific issue (Johnson & Johnson, 1985), are consistent with constructivism and constructivist teaching methods. Significantly, Newman's view is that a university must be a place where, "by familiar intercourse and for the sake of intellectual peace ... (people can) adjust together the claims and relations of their respective subjects of investigation. They learn to respect, to consult, to aid each other" (cited in De Lacey & Moens, 1990, p.3) (emphasis added). Newman's original vision agrees with an emphasis by modern constructivists on students' learning or sense-making and collaboration during discussion and problem-solving (e.g., Cobb et al. 1991; Yackel, Cobb & Wood, 1992), and receives support indirectly from related research.

Specifically, Koch (1992) evaluated the effectiveness of constructivist teaching strategies in teaching a remedial tertiary arithmetic course. Participants were 89 undergraduate students; 25 and 64 students, matched on a pre-test of mathematical skills, comprised the experimental and control groups respectively. Students in the experimental group participated in small-group and staff-led class discussions to solve mathematical problems. Students in the control group received lectures on mathematic skills only and students' questions were answered by staff. On tests of mathematics anxiety and students' attitudes toward themselves as mathematics learners, students in the experimental group showed less anxiety and more positive self-perceptions than those in the control group. Students in the experimental group "out performed (those in) the control group in mathematical skills" (p.16); results of t-tests performed on post-test means between control group classes and the experimental group were significant at the 0.001 level. Burron, Lynn